Nos. 19,753, 19,754 and 19,755

In the

United States Court of Appeals

For the Ninth Circuit

OLIVER J. OLSON & CO., a corporation, *Libelant,* vs. The American Steamship MARINE LEOPARD, etc., and LUCKENBACH STEAMSHIP COMPANY, INC., a corporation, *Respondents.*	No. 19,753
LUCKENBACH STEAMSHIP COMPANY, INC., a corporation, *Libelant,* vs. OLIVER J. OLSON & CO., a corporation, et al., *Respondents.*	No. 19,754
In the Matter of the Petition of OLIVER J. OLSON & CO., a corporation, for exoneration from, or limitation of, liability, as owner and operator of the Steamship HOWARD OLSON.	No. 19,755

Petition of Appellee Oliver J. Olson & Co. for Rehearing En Banc

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Nos. 19753, 19754 and 19755

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Petition of Appellee Oliver J. Olson & Co. for Rehearing En Banc

Appellee Oliver J. Olson & Co. respectfully petitions this Court for rehearing *en banc* on the following issues and on the following grounds:

I.

VALUATION OF THE HOWARD OLSON

On this issue the Court has now held the only test of value of a commercial asset is the amount for which it can be sold. It has

held that the fact that the asset destroyed by a tort feasor cannot be replaced by its owner for the amount it would bring in a sale is immaterial. The decision as rendered adopts an over-simplified axiom, i.e., "The worth of a thing is the price it will bring." This completely abandons the law of "restitutio in integrum."

The opinion in this case is not limited to its own facts. It sets down a sweeping rule of law on the measure of damages. The rule can be applied to any income producing asset, not just ships, and with disastrous and unjust results.[1]

The holding of the opinion can be fairly and completely summarized as follows:

Olson had a lumber schooner with coastwise privileges, and it earned for Olson $78,000.00 per year net.[2] If it were sold foreign it would bring only $200,000.00 because foreign purchasers did not need coastwise privileges, and there were many ships foreign operators could buy that suited their needs. So the price was very low. Other operators requiring coastwise privileges, for reasons of their own, were not interested in acquiring such a specialized ship as an addition to their fleet, consequently there were no "domestic" sales to be used as a measure of value.

The ship is destroyed by a tort feasor. There were virtually no vessels suitable as lumber schooners that had coastwise privileges,

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1. If this opinion is meant to apply to a factual situation where the owner of an asset is found as a matter of fact in the position of attempting to dispose of the asset at the time of its destruction, then this Court has reversed a finding by the District Court that is supported by substantial evidence, and not clearly erroneous. In addition, the Court has apparently agreed with the District Court in its holding that a tort feasor cannot take advantage of this fact even if true. If the conclusion of the opinion is based upon the statement appearing at page 4 "Olson made no effort to replace her with another freighter but, in accordance with the trend in the coastwise trade, turned exclusively to barges" then the Court has overlooked the uncontradicted fact that such replacement barge cost Olson $750,000.00 to $800,000.00. Transcript before Commissioner (R.T.C. herein hereafter), page 129, and that no such barge would have been built were it not for the loss of the *Howard Olson*. R.T.C. 29, 33, 431-434, and further that because of the loss of the *Howard*, Olson Co. could not see fit to sell the *Mary* even though they had offers of $400,000.00 for her. R.T.C. 40, 41 and 53.

2. R.T.C., page 27.

available for purchase. It is uncontradicted that replacement cost depreciated was $430,000.00 and that it would cost Olson approximately $430,000.00 to obtain a replacement for the lost vessel. The Court awards "market value" of $200,000.00 as restitution for the loss.

Without argument we ask this question:

Has Olson received "restitutio in integrum?"

The Court has stated in its opinion at page 9 "The fact that no domestic buyer bought the *Barbara Olson* or the *Karen Olson,* both of which had coastwise privileges, indicates that these privileges added no appreciable marketable value to those vessels or to the *Howard Olson.*"

The fact that this feature may not have been marketable makes it no less necessary to Olson. The fact that no domestic buyer bought these ships proves only that no coastwise operator, who could use a vessel particularly adapted for the lumber trade, were then inclined to increase their fleet. The statement of the Court begs the question that was answered in the *President Madison,* 91 Fed. 2d 835, (9th Cir. 1937) wherein the Court rejected a "sale price" measure by stating of The Harvester:

> "Her peculiarities . . . would not have been reflected in the price commanded by the vessel in a market where these features were unnecessary and superfluous. *Such a price could not give the owner, who needs these special features for his trade, the value of what he has lost.*" (emphasis added)

The fact that no domestic buyer paid more for the *Karen* and *Barbara* merely proves the fact assumed in the *President Madison,* i.e., that no one would be interested in buying the vessel with her special features to compete in the Skagit river trade. In this case it was shown by the record that Olson was well established in the lumber carrying business and was the one coastwise operator that was making a substantial profit, R.T.C. 418-423. The fact that a buyer with an I.C.C. certificate did not care to increase its fleet of

lumber schooners and enter into competition with Olson does not prove that the ship was any less valuable to Olson.[3]

The Commissioner (and thus the District Court) stated "I find no decided case that accords any relevance to a market of vessels which could not have been replacements for the vessel lost . . ."

Counsel for Luckenbach in nine years of looking haven't found one either, and we urge the Court that this case should not be the first, for it will revolutionize the measure of damages for any asset having a unique commercial value to its owner.

We respectfully urge that the Court insert in its opinion the uncontradicted fact that the *Howard Olson* could not be replaced by a comparable vessel for use in the coastwise trade for less than $430,000.00 and thereafter reason from that premise. We suggest the conclusion will be different from the present opinion, but if not, at least all of the essential premises will be readily available for further review should the occasion arise.

We also call to the Court's attention that in the case of *Standard Oil Co. v. Southern Pac. Co.,* 268 U.S. 146 (1924), upon which the Court places great reliance, there was no market into which a vessel could be bought or sold. The Supreme Court therefore adopted an artificial test to determine what it could have been sold for if sales were permitted, but this case assumes that if sales were permitted, like vessels could have been purchased to replace the one that was lost. The case does not involve a vessel with unique commercial value to the owner, but involves only determining value in a situation where sale price and cost of a replacement were presumed to be the same if sales and purchases had been permitted. This is proved by the fact that the award was actually based on evidence of "cost of reproduction" with a small reduction for depreciation. In other words—what it would cost to replace the vessel lost.

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3. It is very probable that Olson would not have sold to a potential competitor. This is shown by the fact that Olson never offered the vessel for sale on an open basis, but only asked brokers to bring an offer which would be passed on by the Board of Directors. R.T.C. 622 and 958.

The opinion states (at page 8) that "no replacement factor was injected" in *Standard Oil Co. v. Southern Pac. Co.* (supra).

The Fourth Circuit has interpreted this case directly opposite. In *Rand v. Lockwood,* 16 F.2d 757 (C.C.A. Fourth Cir. 1927) the Court relied on *Standard Oil v. Southern Pacific* for the following statement appearing at page 759:

> ". . . If one man by negligence or design destroys the property of another, he must put the injured party in the situation in which he was before the wrong was done. If he has sunk his ship, he must give him money enough to enable him to get as good a ship, either by buying another in the market, if that can be done, or, if it cannot, by having one built. *Standard Oil Co. v. Southern Pacific,* 268 U.S. 146."

If Olson can recover only the amount for which the vessel could have been sold, without regard to cost of replacing this income producing asset, then the entire matter of damages should be retried, and Olson awarded additional damages representing the loss of net earnings from the vessel during its working expectancy.[4] The only reason this is not normally done in collision cases is that there exists a basic presumption that the award for loss of the vessel puts the owner in the position to replace it and continue its earnings.

The Hamilton, 95 Fed. Rep. 844 (D.C.E.D. N.Y. 1899).

In the cited case the Court refused to award loss of earnings on the ground that "it is contemplated that the market abounds in ships awaiting purchase, so that with the $125,000.00 the libelant may at once substitute a new ship for the one lost."[5]

The opinion at page 8 states:

> "The *President Madison,* in our opinion, does not represent a holding that the market value test is whether other

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4. This can be done from the record made before the Commissioner.

5. *The Hamilton* (supra) is cited and quoted with approval by the Ninth Circuit in *Redwood-Sun-D'E,* 81 Fed. 2d 680 at page 685, 1936 AMC 774 at page 785.

> vessels can be purchased in the open market to replace the one which is lost."

Without argument, we call the Court's attention to language of the *President Madison,* 91 Fed. 2d 835 at 844, wherein almost identical words were used to phrase the argument that lost.

> "It is urged that the market value test is not whether other vessels can be purchased in the open market to replace the one that is lost . . ."

And Judge Denman's flat rejection of the contention:

> "The argument *overlooks* the economic reasons for the market value test, and for substituting other criteria when that fails."

It is suggested there could not be a more definitive holding on the issue.

In the twenty years since Judge Denman's decision there has been more and more specialization of machines for the particular purposes of their owners and thus the "economic reasons" for "substituting other criteria" when selling price does not reflect the value of the lost asset are more prevalent.[6]

Before this Court chooses to "overlook" these economic reasons, it is respectfully requested that the issue be reheard *en banc.*

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6. As an example: A manufacturer owns three computers, each programmed for his special needs. He decides to replace two of them and contracts to buy a different type to serve their purpose, intending to keep the third. While the replacements are being built the third is destroyed by a tort feasor. Before a value can be placed on the third the owner disposes of the first two as originally planned. No buyers need the special features, so he sells them as basic machines with no increment for the programming. As to the third, it will cost twice as much as he got for each of the first two in order to get a computer with the special programming needed in his business. Is not the liability of the tort feasor measured by replacement cost, less depreciation? Certainly not by the sale price of the other two machines, "since such a price could not give the owner, who needs those special features for his trade, the value of what he has lost."

The facts of this example are identical to the case at bar except a programmed computer has been substituted for a ship with coastwise privileges.

II.

THE DISPOSITION OF THE LIABILITY FOR DEATH AND PERSONAL INJURY

The Court has held that even though Olson was granted full limitation of liability, it must nevertheless bear one-half of the personal injury and death claims from a $60.00 per ton fund by reason of 46 U.S.C. 183(b). The Court has based its conclusion on two premises. The first is stated at page 12 of the opinion as follows "The purpose of 183(b) is to secure some recovery to death and personal injury claimants; there is no indication that it was also intended to alter established Admiralty concepts by allowing a limiting ship to avoid primary liability in a mutual fault collision." This statement misses the point. None of the limitation statutes alter liability, they merely limit the obligation to pay. Before the 1936 ($60.00 per ton) amendment the liability of a limiting ship at fault, was existent and remains existent since the amendment. Only the obligation to pay is affected.

The question then is not whether the 1936 amendment altered the liability of a limiting ship in a mutual fault collision, but whether it altered the obligation to pay. Olson's position is that it altered the obligation to pay only to the extent that the loss cannot be borne by the non-limiting ship *without* imposing an additional burden on the non-limiting ship.

The opinion at page 12 states: ". . . it does not follow that the limiting ship in a mutual fault collision can avoid liability altogether *at the expense of the non-limiting ship.*"

We agree with this statement, and went to some length in the Olson brief (pages 17, 24) to emphasize that in the factual situation before the District Court, *no additional expense* was placed on the non-limiting ship by requiring it to bear all the personal injury and death claims, because the entire amount could be set off against Olson's damages with the net result that each ship bears one-half of Personal Injury and Death Claims (P.I. &

D. hereafter) and no $60.00 per ton payments inure to the benefit of Cargo.

If the valuation of the *Howard Olson* is to be reduced to the point where Luckenbach's damages are equal to, or less than Olson's, the monetary *result* reached in the opinion in this case is approximately correct, but the method of reaching it is erroneous. A flat rule that the limiting ship must pay one-half of P.I. & D. out of the $60.00 per ton fund, if adequate, leads to results incompatible with the purpose of the $60.00 per ton amendment.

As shown in Olson's brief, pages 18 and 19, the legislative history of the amendment shows that the wording was intended to "leave undisturbed the position which Cargo claimants held since the enactment of the original limitation of liability act."

To achieve this end in a mutual fault collision case where one vessel limits and the other does not, *only one rule* will work in all arithmetical situations. The premises upon which the rule is based are established in the Olson brief without contradiction from Luckenbach or Cargo. The premises and the rule can be stated as follows:

(1) Cargo interests are not entitled to benefit, either directly or indirectly from a shipowner's payments to personal injury and death claims from a $60.00 per ton fund.

(2) The amendment was intended primarily to guarantee a recovery to personal injury and death claimants where no other source of recovery is available, and was not intended as an *outright* imposition of *additional liability* on a limiting vessel.

(3) The maritime law applicable to mutual fault collision has, as one of its primary purposes, the equal division of damages between the colliding vessels.

(4) If in a mutual fault collision a limiting vessel were required to pay one-half of the personal injury and death claims from the $60.00 per ton fund, irrespective of the comparative damages between the vessel, such payment would inevitably tend to create or increase the fund available for Cargo.

(5) If the non-limiting vessel were required to bear the total liability to all personal injury and death claims, irrespective of whether the amount could be set off against the damages of the limiting ship, there would result an unequal division of damages between the vessels.

On the above premises, there appears to be only one rule that will achieve the purposes of the Limitation of Liability Statutes and preserve the objective of equal division of damages between the vessels. The rule can be stated as follows:

In a mutual fault collision, where one vessel is a total loss and successfully limits liability, the non-limiting ship is primarily obligated to pay all personal injury and death claims, however, in striking the balance between the vessels the non-limiting ship shall be required to bear the excess of one-half of personal injury and death claims, only to the extent that such excess can be set off against the damages of the limiting ship, and to the extent that such payments cannot be set off, the cost must be borne by the limiting vessel from the $60.00 per ton fund, up to the extent of the fund, if necessary.

The District Court correctly applied this rule to the arithmetic of the case before it. The District Court found that Olson suffered damage in the amount of $445,588.00. Luckenbach suffered damage in the amount of $202,809.00 before payment of personal injury and death claims. The difference is $242,779.00. The personal injury and death claims totaled $181,432.00. Luckenbach was required to bear the primary liability for personal injury and death claims. In striking the balance between the vessels, Luckenbach was required to bear the excess of one-half to the extent that such excess could be set off against Olson's damages. In this case the entire remaining one-half ($90,716.00) can be set off. This results in Luckenbach paying the entire $181,432.00. Adding this total amount to its damages, giving an overall total of $384,241.00 to be set off against Olson's $445,588.00.

Since there is still an excess of damages on the Olson side of $61,349.00, Luckenbach is required to pay one-half of that difference to Olson thus equalizing the damages between the vessel. Each vessel thus bears $414,915.00 of the total damage.[7] This does not result in Olson "avoiding liability altogether at the expense of the non-limiting ship," and in fact does not increase the expense of the non-limiting ship one cent.

This also achieves the statutory intent of not requiring Olson to pay anything from the $60.00 per ton fund that would inure to the benefit of Cargo.

If the valuation of the *Howard Olson* were reduced to $200,000.00 as suggested by the present opinion of the Court, the rule with respect to allocation of personal injury and death claims would operate as follows:

Olson's total damages would be $215,588.00. Luckenbach's would remain at $202,809.00 before payment of death and personal injury claims. The difference would be $12,799.00. Applying the correct rule Luckenbach would be required to pay the primary liability to personal injury and death claims, but in striking the balance between the vessels, Luckenbach would be required to bear the excess of one-half only to the extent that such excess could be set off against Olson's damages.

This excess capable of offset is $6,389.50 (or one-half the original difference in damages). So Luckenbach would bear $97,105.50 (one-half total, plus excess of one-half allowable as set off) of personal injury and death claims and Olson would bear $84,326.50 (one-half total, less excess borne by, and set off by, Luckenbach) from the $60.00 per ton fund. Each would add their respective liabilities to their damages, and the total suffered by each vessel is equalized at $299,914.50. Since the damages are then equalized there would be no further payment by Lucken-

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7. The amount paid by Luckenbach to Olson is, of course, surrendered to the limitation fund for benefit of unpaid claimants.

bach to Olson.[8] Since there would be no payment into Olson's limitation fund for the benefit of Cargo, the payments by Olson from the $60.00 per ton fund would not inure to the benefit of Cargo. Thus the purposes of the Limitation Statutes would be achieved, and there would be equal division of damages between the vessels, and no avoidance of liability by Olson at the expense of Luckenbach.

Unlimited examples could be given proving the validity of the rule as set out herein, but no further purpose would be served.

A flat requirement that each ship bear one-half the personal injury and death claims at the outset (as the opinion now holds) will result solely in making the $60.00 per ton fund inure to the benefit of Cargo.

If the valuation of the *Howard Olson* is affirmed at $430,000.00, and the Court adheres to its opinion on allocation of death and personal injury claims, Luckenbach would be required to bear a primary liability of *only* one-half the total personal injury and death claims, Luckenbach's total damages would be reduced by $90,716.00 to a total of $293,525.00. Olson would be required to bear one-half of personal injury and death claims from the $60.00 per ton fund and Olson's damages would be increased by $90,716.00 to a total of $536,304.00. If the balance were then struck between the vessels the difference would then be $242,-779.00. Luckenbach would be required to pay into Olson's limitation fund one-half this difference or $121,389.00. This amount (or at least 80% of it, if the fund is prorated between Cargo and one-half personal injury and death claims as the opinion now holds) would go to benefit of Cargo.

The District Court, by correctly allocating personal injury and death claims to Luckenbach, created a fund of $30,673.00. If

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8. Since the vessels each advanced one-half of personal injury and death claims the decree would provide that Luckenbach repay Olson $6,389.50, plus interest.

Olson is required to pay $90,716.00 from the $60.00 per ton fund, the fund available to Cargo is increased to $121,389.00; an increase of $90,716.00, the exact amount of the payments under the $60.00 per ton fund.

This would permit Cargo to get the direct benefit of the $60.00 per ton fund contrary to congressional intentions and further leaves Olson bearing $90,716 more of the damages than Luckenbach, solely for the benefit of Cargo, even though Olson successfully limited liability.

Therefore it is obvious that the allocation of personal injury and death claims in accord with the present opinion defeats the purposes of the Limitation Statutes and does not achieve equalization of damages between the vessels.

In addition, the application of the correct rule permits Cargo to recover from the Olson limitation fund the full amount of Olson's recovery from Luckenbach to the extent that such recovery represents Olson's "interest in the vessel", and nothing more.

It is respectfully submitted that the present opinion on this issue is based upon the erroneous premise that permitting the limiting ship to "avoid liability altogether" creates an additional "expense of the non-limiting ship". Irrespective of this Court's final decision on valuation the opinion should be revised to set out the correct rule of allocation of personal injury and death claims.

CONCLUSION

Both of the issues herein involve important questions of law and are not limited or controlled by the facts of this case; they each require the reconsideration of the Court.

Respectfully submitted,

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Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

J. Stewart Harrison